1984

The State of Utah v. Ibrian Ortiz : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent.	:	
-v-	:	Case No. 19082
IBRIAN ORTIZ,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1953 AS AMENDED), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK PRESIDING.

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TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE. 1

DISPOSITION IN THE LOWER COURT 1

RELIEF SOUGHT ON APPEAL. 1

STATEMENT OF FACTS 2

ARGUMENT

POINT I. SINCE NOTICE OF ALIBI WITNESS PEDRO REVAS WAS STATUTORILY INSUFFICIENT, REVAS' TESTIMONY WAS PROPERLY EXCLUDED BY THE TRIAL JUDGE. 4

POINT II. COUNSEL'S FAILURE TO PROVIDE SUFFICIENT NOTICE OF AN ALIBI WITNESS DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL. 10

CONCLUSION 17

TABLE OF CASES

Codianna v. Morris, Utah, 660 P.2d 1101 (1983) 11, 17

Griggs v. Averbeck Realty, Inc., 92 Wash. 2d 576, 599 P.2d 1289 (1979). 6

Lemons v. St. John's Hospital of Salina, 5 Kan. App. 2d 161, 613 P.2d 957 (1980) 6

Peatross v. Board of Commissioners of Salt Lake County, Utah, 555 P.2d 281 (1976). 6

People v. Alexander, Mich., 267 N.W. 2d 466 (1978) 10

People v. Buono, N.Y. Sup., 469 N.Y.S. 2d 311 (1983) . . . 9

State v. Anderson, 25 Utah 2d 26, 474 P.2d 735 (1970). . . 7

State v. Case, Utah, 547 P.2d 221 (1976) 8, 9

State v. Forsyth, Utah, 560 P.2d 337 (1977). 6

Cases Cited (Continued)

Page

State v. Haddenham, Utah, 585 P.2d 447 (1978). 7, 8

State v. Larson, Utah, 560 P.2d 335 (1977) . . . . . .

State v. White, Utah, 671 P.2d 191 (1983). . . . . .

State v. Workman, Ariz. App., 600 P.2d 1133 (1979) . . . .

Strickland v. Washington, ____U.S.____, 35 CrL 3066 (decided May 14, 1984) . . . . . .

STATUTES CITED

Utah Code Ann. § 76-6-302 (1953 as amended). . . . . .

Utah Code Ann. § 77-14-2 (1953 as amended) . . . . . .

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent.	:	
-v-	:	Case No. 19082
IBRIAN ORTIZ,	:	
Defendant-Appellant.	:	

STATEMENT OF THE NATURE OF THE CASE

Appellant, Ibrian Ortiz, was charged by information with Aggravated Robbery, a felony in the first degree, in violation of Utah Code Ann. § 76-6-302 (1953 as amended).

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of Aggravated Robbery, a first degree felony, in a jury trial held February 14 and 15, 1983, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, presiding. On March 4, 1983, appellant was sentenced to five years to life at the Utah State Prison and a consecutive sentence of at least one year, but not more than five for using a firearm to commit the offense.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence of the trial court.

STATEMENT OF FACTS

On the evening of September 20, 1982, Richard Bullock was the only attendant on duty at the Quality Oil gas station and convenience store at 3900 South 900 East in Salt Lake City, Utah (T. 9-10). Mr. Bullock was in the back room at approximately 9:00 p.m. when two men entered the building. Mr. Bullock returned to the cash register and the two men approached him. One pointed a gun at Mr. Bullock and ordered him to lie down on the floor, which he did (T. 11, 13). The two men emptied the cash register and fled from the station. Mr. Bullock then got up and called the police.

This entire incident was witnessed by Becky Edwards. Ms. Edwards was just leaving the gas station with her young daughter as the two men entered. Because the attendant was in the back room and the two men looked suspicious, Ms. Edwards paid particular attention to the two (T. 47-49). She returned to her car located near the station's gas pumps and from there watched the entire robbery (T. 47-49).

Both Mr. Bullock and Ms. Edwards accurately and consistently identified appellant as one of the two robbers of the Quality Oil station. Immediately following the robbery Mr. Bullock gave Salt Lake City police officers a description of the robbers' appearance and clothing (T. 20-21). On May 22, two days after the robbery, Detective James Grant of the Salt Lake County Sheriff's Office showed Mr. Bullock an array of approximately 20 photos (T. 26, 61) from which Bullock

positively identified appellant as one of the robbers (T. 107-108). Later that day Detective Grant showed the same photo array to Ms. Edwards; she too identified appellant as one of the robbers (T. 109-109). Ms. Edwards acknowledged some question in her mind as to her identification of appellant because she had seen him with a hat on and found it difficult to picture him with hair (T. 53-54). She did recognize his face (T. 54), however, and by covering up the hair on all the photographs, Ms. Edwards was able to identify appellant from the photo array (T. 63-65). Both Mr. Bullock and Ms. Edwards also positively identified appellant in the courtroom (T. 15, 52); both witnesses accurately identified co-defendant Leonardo Rayes[1] as the other robber (T. 14, 52, 105).

Appellant denied being with co-defendant Rayes on the evening of the robbery (T. 138) and claimed that he had spent that entire evening with Pedro Revas and Santiago Crisbo (T. 137, 139). The three men were stopped near 1500 South 200 East, Salt Lake City, by a policeman around 10:30 p.m. that evening (T. 118-119) in response to an earlier report of a suspicious-looking vehicle near the vicinity of the robbery. Appellant gave notice of, but was unable to locate, Crisbo to testify as an alibi witness. The trial court did not allow Revas to testify because of the severely inadequate notice

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[1] Leonardo Rayes' conviction is currently pending appeal before this Court.

given to the State the Thursday preceding the Monday trial.

ARGUMENT

POINT I

SINCE NOTICE OF ALIBI WITNESS PEDRO REVAS WAS STATUTORILY INSUFFICIENT, REVAS' TESTIMONY WAS PROPERLY EXCLUDED BY THE TRIAL JUDGE.

The defense of alibi is governed by Utah Code Ann. § 77-14-2 (1953 as amended):

> (1) A defendant . . . who intends to offer evidence of an alibi shall, not less than ten days before trial or at such other time as the court may allow, file and serve on the prosecuting attorney a notice, in writing, of his intention to claim alibi. The notice shall contain specific information as to the place where the defendant claims to have been at the time of the alleged offense and, as particularly as is known to the defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish alibi.

The prosecutor has a reciprocal obligation to give ten days' notice of alibi rebuttal witnesses. If a party fails to give proper notice within the statutory requirements, "the court may exclude evidence offered to establish or rebut alibi." (Subsection (3)). Subsection (4) of the statute states that "[t]he court may, for good cause shown, waive the requirements of this section."

In the case at bar, the State first received notice of appellant's only alibi witness on Monday, February 7, 1983,

when defense counsel disclosed her intent to rely upon the testimony of Santiago Crisbo (T. 130). This notice came just one week prior to the February 14 trial date, but the court held that the notice was adequate. Mr. Crisbo was subsequently released from the Salt Lake County Jail (his known residence) before either side had had an opportunity to interview him. Upon learning that Pedro Revas was also incarcerated at the jail, defense counsel telephoned the prosecutor to let him know of her intent to substitute Revas for Crisbo (T. 129). This phone notice came on Thursday afternoon at approximately 4:00 p.m., February 10, which preceded a long state holiday weekend (T. 130). The trial court held that under these circumstances, with the additional complication of obtaining an interpreter to be present for an interview, it would be an unreasonable burden on the State, based on the inadequate notice given, to allow Revas to testify (T. 133).

Appellant asserts that the trial court abused its discretion in not allowing defense counsel to present alibi witness Pedro Revas, notwithstanding the fact that the State did not receive notice of this witness until the Thursday before the Monday trial - several days short of the ten day statutory minimum. Besides his failure to comply with the timing requirements of § 77-14-2, appellant also did not provide written notice of alibi witness Revas as is required by the statute. This Court need not blindly accept

appellant's mere allegation that the trial court abused its discretion. In State v. Larson, Utah, 560 P.2d 335, 336 (1977) this Court stated that the "burden lies on the party claiming abuse of discretion to make such a showing . . ." No showing of abuse has been made in the present case.

Decisions based upon the trial court's exercise of discretion enjoy a great degree of deference when subsequently challenged. "[A]s in all discretionary matters, due to his prerogatives and his advantaged position, the trial court is allowed considerable latitude in the exercise of that discretion, which the appellate court will not interfere with unless it plainly appears that there was abuse thereof." State v. Forsyth, Utah, 560 P.2d 337, 339 (1977). (Emphasis added). The trial judge's rulings are not to be disturbed absent a showing that the trial judge exceeded his authority or acted beyond reason. Peatross v. Board of Commissioners of Salt Lake County, Utah, 555 P.2d 281, 284 (1976).

Although this Court has not specifically adopted such a definition, other courts have uniformly held that an abuse of discretion results only "when no reasonable person would take the position adopted by the trial court." Griggs v. Averbeck Realty, Inc., 92 Wash. 2d 576, 599 P.2d 1289, 1293 (1979). See also Lemons v. St. John's Hospital of Salina, 5 Kan. App. 2d 161, 613 P.2d 957, 960 (1980). In the present case, while reasonable persons may differ as to whether the state received adequate notice of alibi witness Revas,

where the rebuttal witnesses had already previously testified during the State's case-in-chief the defense had been given "implied prior knowledge" of the content of their testimonies. 585 P.2d at 448. No new evidence was offered by these rebuttal witnesses, but only a clarification of information which already had been presented at trial. The Court concluded that, based upon these facts, the trial court had not abused its discretion by allowing the witnesses to testify in rebuttal. The holding of Haddenham, however, should not be extended beyond its particular facts. In the case at bar the State did not have "implied prior knowledge" of Revas' testimony as that term was restricted to the fact situation in Haddenham. The State was given no opportunity to discover the content of Revas' testimony; any statements made by Revas at trial would have created unfair surprise. Revas' testimony was properly excluded.

State v. Case, Utah, 547 P.2d 221 (1976) also has significant factual distinctions from the case at bar. In Case the testimonies offered as rebuttal to the alibi defense included that of the victim, who had already testified as a prosecution witness, and that of a witness subpoenaed by the defense but not called to testify at trial. The Court reasoned that the defendant would not be prejudiced by the testimonies because the defense was in a position to know the content of the two witnesses' testimonies -- the victim's because she had already testified and was subject to defense

questioning, and the uncalled defense witness' because he had been subpoenaed and undoubtedly had been interviewed by the defense. Therefore, the trial court was justified in allowing these witnesses to testify despite failure of the prosecution to give advance notice in compliance with the statute.

Thus, this Court has established an exception to the general rule of ten days' notice of alibi or rebuttal witnesses. In order for a party to fall within this exception, opposing counsel must know of the content of the alibi or rebuttal witness' testimony, either through prior testimony actually offered at trial or through an opportunity to question the witness prior to trial. In the present case, the State was given no opportunity to discover the content of Revas' testimony. Although Revas was alleged to have been with appellant on the evening of the robbery, absolutely no earlier indication was given by appellant that Revas would be called as an alibi witness.

Although not a Utah case, the recent decision of People v. Buono, N.Y. Sup., 469 N.Y.S.2d 311 (1983), is applicable to the present case. In Buono, the New York Supreme Court expressly rejected this Court's holding in State v. Case, 547 P.2d 221, and held that even though the defendant had provided the name of the witness as a possible alibi, the prosecutor could not call him as a rebuttal witness without proper statutory notice. The Buono court reasoned that the

defense was entitled to know whom the prosecution would rely upon in rebuttal; the prosecutor's mere opportunity to know the content of a possible witness' testimony is not enough to overcome the statutory notice requirement. See also People v. Alexander, Mich., 267 N.W. 2d 466, 468-469 (1978).

In the instant case, the State had neither opportunity to interview Revas, nor actual knowledge of the defense's intention to call Revas as an alibi witness until just a few days before the trial. The notice given was inadequate. Where proper notice has not been given, the trial court has discretion to allow or disallow testimony by the witness. Absent a showing of abuse of discretion the trial court's decision should not be reversed. Therefore, this Court should affirm Judge Frederick's exercise of discretion in not allowing Revas to testify.

POINT II

COUNSEL'S FAILURE TO PROVIDE SUFFICIENT NOTICE OF AN ALIBI WITNESS DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellant claims that he was prejudiced by inadequate representation when defense counsel failed to file notice of an alibi witness within the statutory deadline, thus preventing appellant from corroborating his alibi. Appellant's claim is without merit. The governing legal standards applicable to a claim of ineffective assistance of

counsel were recently summarized by this Court in Codianna v. Morris, Utah, 660 P.2d 1101 (1983):

> This Court has previously held in a murder case involving appointed counsel that an accused "is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interest of the accused and present such defenses as are available under the law and consistent with the ethics of the profession. State v. McNicol, Utah, 554 P.2d 203, 204 (1976). Accord, State v. Gray, Utah, 601 P.2d 918 (1979); Strong v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969). The McNicol test has a subjective element--"willingness to identify himself with the interests of the accused"--and an objective element--" competent member of the Bar." The objective element is measured both by general ability or experience and by performance in the defense of a particular case. Both elements (willingness to identify with the accused, and competence) are essential to adequate representation. The McNicol test, which we reaffirm, includes all of the requirements the Court of Appeals for the Tenth Circuit identified in its recent redefinition of the constitutional requirements of effective assistance of counsel. After rejecting the "sham and mockery" test that had previously been applied in the Tenth and other circuits, the court held: "The Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney." Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) (en banc).
>
> Relying on Dyer v. Crisp, supra, and other authorities, our recent opinion in State v. Malmrose, Utah, 649 P.2d 56, 58 (1982), identifies the following considerations necessary to determine whether a conviction should be reversed or set aside on the basis of ineffective assistance of counsel: (1) The burden of establishing inadequate representation is

> on the defendant, "and proof of such must be demonstrable reality and not a speculative matter." State v. McNicol, 554 P.2d at 204. (2) A lawyer's "legitimate exercise of judgment" in the choice of trial strategy or tactics that did not produce the anticipated result does not constitute ineffective assistance of counsel. State v. McNicol, 554 P.2d at 205. (3) It must appear that any deficiency in the performance of counsel was prejudicial. State v. Forsyth, Utah, 560 P.2d 337, 339 (1977); Jaramillo v. Turner, 24 Utah 2d 19, 22, 465 P.2d 343, 345 (1970). In this context, prejudice means that without counsel's error there was a "reasonable likelihood that there would have been a different result . . ." State v. Gray, 601 P.2d at 920. Similarly, as we noted in State v. Malmrose, 649 P.2d at 58, "the failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance.

660 P.2d at 1109. These standards parallel those set forth by the United States Supreme Court in its recent decision of Strickland v. Washington, ___U.S.___, 35 CrL 3066 (decided May 14, 1984). Under the Sixth Amendment a defendant is entitled to "reasonably effective assistance" of counsel. However, a reviewing court's analysis of an ineffective assistance claim is two-tiered. As stated in Strickland:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient

> performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

35 CrL 3071.

In the case at bar neither deficiency of counsel's performance nor prejudicial result has been shown by appellant. The trial transcript reveals that upon Judge Frederick's denial of Revas' testimony, defense counsel Ms. Nesset-Sale requested that the record "reflect that the delay and the noncompliance because of the delay . . . [left] Mr. Ortiz open for a valid claim of ineffectiveness of counsel" (T. 131). The trial judge, however, would not acknowledge any claim of incompetency and instead placed the blame for the lateness of information regarding Revas on appellant. The trial transcript, in relevant part, reads as follows:

> [MS. NESSET-SALE:] I do believe that because of this Court's ruling, Mr. Ortiz' right to have his defense put on has been jeopardized, and certainly there is an ineffectiveness-and-incompetence-of-counsel argument that ought to be well taken by a review in court [of] this matter.
>
> THE COURT: The Court certainly appreciates your position, Ms. Nesset-Sale. However, the Court is not ready to acknowledge any claim of incompetency or ineffectiveness of counsel. I think on the contrary, you have conducted yourself in a very journeyman-like manner in the presentation of the defense in this case . . . .

> The record further reflects that Mr. Ortiz either was or should certainly have been aware of those persons upon whom he was going to rely for purposes of establishing his alibi or individuals with whom he was personally acquainted in the vehicle the night of the stop testified to by Officer Robinson. Therefore, it certainly may well have been the case, and I don't choose at this time to inquire of you whether or not it was, but certainly the Court's view that it may well have been the case that if there was any blame to be placed for the lateness of providing information about the other individual, Mr. Revas, that you intended to rely upon at this time, that may well lie on Mr. Ortiz as opposed to his counsel.

(T. 131-132).

In the event that blame is placed on counsel, it is clear that defense counsel's failure to provide adequate notice of Revas as an alibi witness resulted from counsel's trial tactics, not incompetency. Defense counsel chose to call Santiago Crisbo as the only alibi witness, although she could have given notice of a second potential alibi witness at the same time. The record does not indicate the specific reasons for appellant's counsel's decision not to give earlier notice of this second alibi witness. However, it should be presumed that counsel had valid, tactical reasons for that decision. As noted by the court in State v. Workman, Ariz. App., 600 P.2d 1133 (1979):

> Courts distinguish between counsel failing to act because of ignorance of the facts or the law, and failing to act despite his knowledge of the facts or law. In the latter situation, counsel is

> presumed to have made an informed decision, even where the tactical advantage is not readily apparent to the appellate court.
>
> Especially when the question is whether or not to call a particular witness, courts are reluctant to second-guess the attorney. There are factors that do not readily appear on record that can lead an attorney to decide that a particular witness is undesirable or that his participation in the defense may harm the defendant more than his testimony, even if it provides an alibi, will aid him.

600 P.2d at 1135.

Defense counsel originally chose not to rely on Revas as an alibi witness, and this Court should not second-guess the reasoning behind that decision. When her original witness, Crisbo, was unavailable to testify, only then did appellant's counsel give notice of Revas. By then, however, it was too late to comply with the statute. Defense counsel's trial tactics in relying on Crisbo did not produce the desired result, but this failure must not be interpreted as ineffective assistance of counsel. "A contrary conclusion would be merely speculative and the appellant presents no evidence to support one." State v. White, Utah, 671 P.2d 191, 194 (1983).

With respect to the defendant's burden to show prejudice if he or she is able to show that particular errors of counsel were unreasonable, the Supreme Court stated:

> Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.
>
> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866-867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.
>
> . . .
>
> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 35 CrL at 3073.

Setting aside appellant's failure to show that counsel's error was unreasonable, appellant has made no showing of prejudice to the extent that the outcome of the trial would have been effected. The trial record contains consistent eyewitness identification of appellant as a participant in the robbery (T. 15, 52, 108-109). Appellant has not shown a reasonable probability the jury's decision would have been effected substantially by Revas' testimony had he been allowed to testify as an alibi witness. Rather, the evidence was sufficient to sustain appellant's conviction despite his alleged alibi. The requirements for a showing of ineffective assistance of counsel, as mandated by this Court

in Codianna and by the United States Supreme Court in Strickland, have not been satisfied. Appellant's conviction should be upheld.

CONCLUSION

The trial judge, Judge Frederick, properly exercised his discretion in disallowing alibi testimony by Pedro Revas. The statutorily imposed notice as to Revas was severely deficient, and did not provide ample time for the prosecutor to prepare rebuttal testimony. Absent a showing of abuse of discretion, the trial court's decision should be upheld.

The insufficiency of notice must not be attributed to inadequacy of counsel, but rather was the result of trial tactics which failed to produce the desired result. Defense counsel was not ignorant of Revas' testimony, but instead chose to rely upon another alibi witness. Counsel's inability to locate Crisbo and the resulting insufficient notice as to Revas is in no way a reflection upon counsel's representation of appellant. Moreover, the evidence presented at trial established appellant's guilt and no showing was made that a different result was reasonably probable had Revas' alleged alibi testimony been permitted. Based upon the foregoing, the judgment and sentence of the trial court should be affirmed.